ROCKY MOUNTAIN TIMBER COMPANY,	)	**AGBCA No. 2005-146-1**
	)	
Appellant	)	
	)	
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RULING ON MOTION FOR SUMMARY JUDGMENT

September 11, 2006

BEFORE POLLACK, VERGILIO, and STEEL, Administrative Judges.[1]

Opinion for the Board by Administrative Judge POLLACK. Separate concurring opinion by Administrative Judge VERGILIO.

BACKGROUND

This appeal arises out of the Marias Helicopter LP Salvage Timber Sale, Contract No. 14-01-058357, between Rocky Mountain Timber Company (Appellant) of Hamilton, Montana and the U. S. Forest Service (FS), Kootenai National Forest, Libby, Montana. The claim arises out a sale on the Kootenai National Forest. The Appellant's claim is pursued on behalf of its subcontractor, E.M. Logging. The amount in dispute is $135,668.01.

[1] Administrative Judge Steel of the Interior Board of Contract Appeals sits by designation.

In setting out the FS Motion, counsel for the FS provided a straight-forward statement of the FS position. In reply, counsel for the Appellant provided a similar direct response. This ruling on the motion follows the structure set out in the FS Motion and is limited to the issues raised therein. For purposes of this ruling references to Appellant's Exhibits (AE) refer to exhibits attached to its Memorandum in Opposition. Because of the relative brevity of both the FS Motion and Appellant's response, in some instances where we consider the citing of factual authority to be helpful, we cite to pages in the briefs rather than the specific documents identified and relied upon in those briefs. The briefs take the reader to the particular documents.

Appellant has alleged three separate breaches of its contract. First, it contends that the FS breached by not allowing it the use of two roads located within the Sale Area. Those roads had not been designated as restricted under contract provision C5.12#, the provision dealing with road restrictions. In its second claim, Appellant contends the FS breached by failing to allow it the use of a helicopter landing area, as provided under contract provision C6.422. It says the FS failed to disclose that the FS and the Kootenai Tribe had predetermined the location of all helicopter landing areas and had not disclosed to prospective purchasers the fact that no other landing areas would be considered. In the final claim, Appellant asserts that the FS violated provision C.24, by failing to identify, in any way, that there were cultural resources that would restrict the operation of the timber sale.

The FS Motion seeks summary judgment on all three matters.

DISCUSSION

Appellant asserts that the FS breached the contract by not allowing it to use Roads 7164A and 999, roads that had not been designated or identified in the contract as being subject to use restrictions, particularly restrictions involving the hauling of logs. The contract provided at clause C5.12#, titled USE OF ROADS BY PURCHASER (6/99) (AE 1, page (p.) 3-4), the following:

> Purchaser's use of existing roads identified on Sale Area Map by the following codes is prohibited or subject to restrictive limitations, unless agreed otherwise:
>
> | Code | Use Limitations |
> |---|---|
> | X | Hauling prohibited |
> | R | Hauling restricted |
> | U | Unsuitable for hauling prior to completion of agreed reconstruction |
> | P | Use prohibited |
> | A | Public Use Restriction |
> | W | Regulation Waiver |

> Roads coded A will be signed by the Forest Service to inform the public of use restrictions. Purchaser's use of roads coded R, A, or W shall be in accordance with the following restrictions.

Clause C 5.12# continued by setting out, below the above language, a table titled Restricted Road List (RRL). The RRL identified various road numbers, provided the road name for each identified road number, set out a Map Legend and then provided a description of the restrictions for each identified road. In a box on the table, designated as Map Legend, the list set out three different designations. Each of the designations covered a different level of restriction. The designations were RRR, XXX or PPP. Seven roads were identified as having some level of restriction. Among them were Roads 7205F, 7164B and 7164. Each were designated in the box on the Map Legend as XXX and described in the restrictions block next to those symbols, as "Hauling Prohibited." The other four roads included in the RRL were identified as either restricted or use prohibited. It is agreed that neither Road 7164A nor Road 999 were included on the list. It is further agreed that during performance, use of both roads were restricted, at least to some level.

In addition to describing the restrictions on the RRL, the contract also addressed restrictions on the Sale Area Map (Appeal File (AF) 297). The Sale Area Map, which had been provided to prospective purchasers, contained a box identified as LEGEND and in that box were various symbols and the explanation for each symbol. Among the symbols was a depiction of two lines (indicating a road) with three X's imposed on top of the lines. Next to the symbol were the words "Existing Road, Hauling Prohibited, C5.12#." The Legend had two other similar designations, one of which depicted three R's, indicating "Existing Road Hauling Restrictions, C 5.12#"; and the other which depicted three P's, identified as "Existing Road, Use Prohibited, C5.12#." In addition, the LEGEND showed a bold dashed line, which was designated SALE AREA BOUNDARY. The symbols RRR and XXX were shown on roads located both inside and outside of the designated SALE AREA BOUNDARY. (AF 78.)

As a threshold matter, the FS appears to concede that it was obligated to identify any roads within the Sale Area Boundary that would be restricted as to use. The FS takes the position that it had no similar obligation for roads shown on the Sale Area Map that were outside of the Sale Area Boundary. The FS acknowledges that it did not identify Road 7164A as restricted. However, the FS contends that it nevertheless did not violate its obligation to Appellant as to Road 7164A, because it claims that it permitted the Appellant to use the road for various operations. The Appellant acknowledges that it was permitted to use the road, however, it contends that the use was limited and did not allow hauling of logs, a critical use. (App. Mem., p. 7-8.)

Appellant has provided evidence that indicates that it was not permitted to use the road for either hauling or for landing of logs (App. Mem., p. 8). The FS has not contradicted that claim nor has the FS shown that it did permit such activity. The FS instead focuses on the fact that the Appellant used the road for access for equipment. (FS Motion, p.3.) The Appellant has described the hauling and landing of logs as vital to its performance and costs. Additionally, and clearly of relevance, the Appellant points out that FS used C.5.12# and the Sale Area Map to specifically designate and

identify roads where hauling and other activities would be restricted. According to Appellant, the fact that Road 7164A was not included in those restrictions gave it reasonable assurance that it could use the road for landings and hauling of logs and that such operations would not be restricted unless specified in the RRL or Sale Area Map.

The FS position rests on the proposition that the limited use is not a restriction that constitutes breach. The FS has provided no legal basis for us to make that conclusion. It has further not provided sufficient factual basis for us to find that the restriction of hauling would not be material. Instead, the evidence indicates otherwise, and certainly for purposes of summary judgment, the FS contentions are woefully inadequate. The FS has not only failed to show the above, but at least on the limited record before us, it appears that breach was likely.

In defending against the Motion, Appellant made arguments which we have chosen not to address, simply because it is clear from the contract language, the Sale Map, and the fact that Appellant could not haul logs or set landings that the FS may have breached, or constructively changed the contract. Therefore, addressing those issues is not necessary. From our perspective the remaining issue here is the materiality of the restriction on hauling. That, however, is a matter which is factual and over which the parties do not agree. That is a matter that will need to be resolved, outside of this Motion. Accordingly, the FS Motion as to Road 7164A is denied.

As identified above, the Appellant's claim involves claimed wrongful restrictions for two roads. As to Road 999, the FS does not deny that the Appellant was restricted from using the road. The FS does not claim it allowed limited use. As to this road, however, the FS claims it has not breached, because Road 999 was outside of Sale Area boundaries and the FS only had an obligation to identify restricted roads that were located inside the boundary. Other than making the bald contention, the FS has provided no contractual or legal basis for that reading. In point of fact, its reading appears to conflicts with the plain meaning of the contract.

The contract provision dealing with restrictions references the "Sale Area Map," not the "Sale Area Boundary." Moreover, as pointed out by Appellant, the Sale Area Map showed more than simply the area within the sale boundary, it showed both that area and surrounding areas. Of particular significance is the fact that the sale map shows restrictive legends in various places on the map, including outside of the Sale Area Boundary. For example, toward the upper left-hand quadrant of the Sale Area Map, the FS has placed three X's and at several locations three R's. A number of these referenced X's and R's are located outside of the sale boundary and all represent restrictions addressed in C5.12#.

Based on the language of the contract and the use of the legend symbols on the Sale Area Map, we find it difficult to disagree with Appellant, at least at this juncture, that the restriction on Road 999, if intended, needed to be shown on the map and identified in C5.12#. Accordingly, we deny the FS Motion on this issue.

Helicopter Landing

The clause in issue, C.6.422 (AE 1, p.2) provides:

> Helicopter Landing Location and Construction (5/76) All helispots, heliports, support areas, and other helicopter landing areas shall be located and constructed only as approved by Forest Service in writing.
>
> Those specified landing and service areas shown on the Sale Area Map are approved and shall be constructed in accordance with plans and specifications attached hereto.
>
> Landing areas other than those specified on Sale Area Map will be considered for approval under the following conditions.
>
> A. The location and extent of landing area are staked on the ground. The extent or limits shall include the total area of excavation and fill, if any.
>
> B. The clearing needed outside the constructed landing area needed for takeoffs and landings are flagged or otherwise designated.
>
> C. Plans are made to dispose of clearing and landing construction slash and debris.
>
> Landing areas shall be constructed and rock surfaced, if necessary, in such a manner that helicopters, log handling equipment, and service or support equipment are fully supported during Normal Operating Season.

The Appellant has claimed that the FS breached by not allowing it to use a helicopter landing area, as provided under C6.422 (AF 252) and further breached by failing to notify bidders that the location of all helicopter landing areas had been pre-determined by the FS and the Kootenai Tribe. It asserts that the facts show that but for the pre-determined landing areas, the FS had no intention to consider any other landing areas. (App. Mem. pp. 11-14.) Clause 6.4222 does not so indicate. There is nothing in that clause that suggests that the sites have already been determined.

The Appellant has further provided evidence that shows that prior to awarding the contract, the FS had prepared, what Appellant has characterized as a secret map with designated landing locations (AE 5, p.1). Those locations had not been revealed to Appellant and in point of fact were not revealed until operation of the timber sale began. Nothing in the contract documents indicated that Appellant would be unable to set landing areas along Roads 7164A or 999. The Appellant further points out that the non-disclosure of the landing site on the map in issue is at odds with how the FS handled another sale, the Shore Nuf Timber Sale. There, unlike here, the FS showed pre-approved locations on the Sale Map. (AE 8, pp. 1-4.)

Relying on its reading of the clause above, the FS presents two alternative arguments to support its Motion. First, the FS claims the clause gives it absolute discretion to approve landing sites. Accordingly, since it has absolute discretion, it had no obligation to approve any site offered by Appellant and therefore cannot be charged with breach. According to the FS, Appellant had no right to use that site and therefore was not damaged.

In the alternative, the FS claims that even if it did not have absolute discretion, the Appellant still cannot prevail, since Appellant did not comply with the contract conditions A, B and C, set out in the clause. The FS points out that the clause states that if a landing is not specified on a Sale Area Map, that a location will only be considered if items A, B and C of the clause have been met. According to the FS there is no written record that the Appellant so complied or that Appellant formally requested a landing on 7164A.

First, as to the matter of discretion. A plain and fair reading of the contract language indicates that a purchaser will have the opportunity to request and ultimately use a landing site not shown on the Sale Map, providing the purchaser meet certain criteria and the site is otherwise approved. To read the clause otherwise, and particularly to read it as claimed by the FS, makes the clause and process described superfluous. We recognize that the clause makes no guarantee that a proposed site will be approved. But clearly the language does not indicate that sites have been predetermined and only those predetermined sites will be allowed. Additionally, the FS does not contest the fact that it had a map that had predetermined sites and that such map had not been provided or made known to potential purchasers. Nevertheless, it chose to issue a contract which indicated otherwise.

As stated above, the FS clearly has the right to use its judgment to decide whether or not a location would be appropriate. No one contests that if the judgment was used reasonably, then the decision of the FS would prevail. However, that is not what appears to have happened in this case. Instead, based on the information before us, there appears to have been no intention on the part of the FS to allow any landing sites but for those it had predetermined, but had not identified. If sites were predetermined, then the wording of clause C6.422 appears misleading. In addition, every contract carries with it the implied duty of the parties to cooperate and not to hinder. Part of such duty includes an obligation by the Government not to abuse its discretion. One can abuse discretion by unreasonably refusing to exercise it.

The FS arguments that the Appellant cannot prevail, because Appellant did not comply with the various criteria set out in the clause, is equally unpersuasive. Appellant has provided evidence that Enos Miller, the logging subcontractor did in fact ask the sale administrator to use landing locations other than those shown on the "secret map." Mr. Miller explained that he raised the issue several times with FS sale administrator and was told by the sale administrator that landings were limited to those identified on the secret map. The FS Sale Administrator, Mr. Rebella, stated that he discussed alternative landing locations with Mr. Miller, but told Mr. Miller that the location could not be changed and that Mr. Rebella could only agree to the locations on the map. (App. Mem., pp. 11-14.) Given this evidence, the FS has not demonstrated at this summary judgment stage that Appellant had to proceed with the details and perform a useless act, when the subcontractor was

being told by the FS that proceeding under C6.422 would be a waste of time. The FS has failed to provide sufficient evidence to support summary judgment on this issue.

In addition to the above, the Appellant, as it did with the hauling restrictions issue, has identified a number of other facts supporting its claim. However, just as before, we need not address all matters raised, for Appellant has provided enough to defeat the FS Motion. Appellant has provided evidence to show that the contract indicates that the contractor can offer landing choices, that locations were predetermined by the FS, that the predetermination was not disclosed to purchasers, that the FS refused to allow the use of any landing but for those on its map, that Appellant sought permission to offer landing sites, that Appellant was denied such permission and that based upon those denials it would have been a useless act to attempt to meet the formal requirements of C6.422. Accordingly, there is no basis for summary judgment on this issue.

Cultural Sites

Appellant claims that the FS violated provisions of C6.24 by failing to identify in any way that there were cultural resource sites which restricted operation of the sale. The cited clause requires that the location of known historical or prehistoric sites, buildings or objects and properties related to American history, architecture, archaeology and culture be identified on the ground by the FS. The FS states that there were no sites meeting the above that restricted operations. The Appellant argues otherwise and cites minutes of a government pre-operation meeting which indicates that landing sites were limited, because of cultural resources; deposition testimony seemingly confirming the same; as well as a letter from the sale administrator to the Contracting Officer (CO) which also indicated a relationship between protecting cultural resources and the selection of landing sites. (App. Mem., pp. 15-16.) We find that there is clearly a factual dispute over whether there were cultural sites and what impact that had. The FS Motion is based on there being no disputed facts. Accordingly, the Motion on this issue is denied.

RULING

The Motion of the FS is denied in its entirety.

_____
HOWARD A. POLLACK
Administrative Judge

Concurring:

_____
CANDIDA S. STEEL
Administrative Judge

Opinion by Administrative Judge VERGILIO concurring.

I concur with the decision of the majority to deny the Government's motion for summary judgment. Disagreeing with various of the assumptions and statements of the majority, I express my view of the contract and rationale separately.

In its complaint, the purchaser asserts three claims, each alleging a breach of contract. The Government seeks summary judgment with respect to each claim.

Claim One

In its first claim, the purchaser states:

> The Forest Service breached the contract by not allowing the use of roads located within the Sale Area that had not been disclosed as restricted roads and the contract provision C5.12# the Forest Service failed to disclose to bidders before the sale auction that there would be other restricted roads that were not identified as restricted in the sample contract or on the Sale Area Map.

(Complaint at 6 (¶ 23) (accurately quoted although inartfully written)).

Clause C5.12# contains the following

> **USE OF ROADS BY PURCHASER. (6/99)** Purchaser's use of existing roads identified on Sale Area Map by the following codes is prohibited or subject to restrictive limitations, unless agreed otherwise.

There follows a list of codes and use limitations. Then, the clause states: "Purchaser's use of roads coded R, A, or W shall be in accordance with the following restrictions:"; immediately following is a chart captioned "Restricted Road List." The chart identifies neither road 7164A nor 999. (Exhibit 30 at 232-33 (¶ C5.12#).) The sale area map does not identify any road as 7164A. That map does identify road 999, which by the legend is a restricted road. No road on the map is identified by a letter code; the legend simply indicates "Restricted Roads." (Exhibit 30 at 280.)

In seeking summary judgment, the Government states that the purchaser "is correct that 7164A and 999 are not listed as restricted roads under C5.12#. However, road number 999 is outside of the Sale Area boundaries, and use of 7164A was, in fact, permitted." (Government Motion at 2.)

Road 7164A

The purchaser acknowledges that the sale area map does not identify this road, said to be a spur road shown on the Forest Development Road Project Area Map (Complaint at 2-3 (¶¶ 6-7)). The purchaser references contract provision C5.12#. (Complaint at 3 (¶ 5)).

The Government maintains that because the purchaser was able to use this road, its use was not restricted. This conclusion does not follow. Simply because a road is used does not demonstrate that use was not restricted.

What neither party has addressed at this stage in the proceedings is the underlying basis for breach. Namely, the sale area map does not identify road 7164A. The parties appear to proceed based upon the undemonstrated presumption that use of this road was guaranteed under the contract, such that actual limitations could constitute a breach. I anticipate that the parties will develop the record and their arguments to address this fundamental issue of contract interpretation.

Road 999

The Government seeks summary judgment on the aspect of this claim relating to road 999, explaining that the road is outside of the sale area boundaries. The Government does not elaborate in its motion for summary judgment. The Government has not demonstrated the relevance of the location of road 999 outside, as opposed to inside, the sale area. The first phrase of the claim relates to "the use of roads located within the Sale Area"; road 999 is not such a road. However, the road is identified in the sale area map, and is encompassed within the remainder of the claim.

What the parties do not address at this stage of the proceedings is that the sale area map identifies road 999 as a restricted road. There is no legend on the map that indicates the type or degree of restriction. Even if one assumes factually, at this summary judgment stage, that the Forest Service restricted use of the road, the parties have not discussed a provision(s) of the contract that was breached. Therefore, factually and legally this basis of the claim remains in dispute.

Claim Two

In its second claim, the purchaser states:

> The Forest Service breached the contract by failing to allow the purchaser to use a helicopter landing area as provided under contract provision C6.422. The Forest Service failed to notify bidders that the location of all helicopter landing areas had been predetermined by the Forest Service and the Kootenai Tribe and that no other landing areas would be considered.

(Complaint at 6-7 (¶ 25).)

Clause C6.422 specifies, in pertinent part:

> **HELICOPTER LANDING LOCATION AND CONSTRUCTION. (5/76)** All helispots, heliports, support areas, and other helicopter landing areas shall be located and constructed only as approved by Forest Service in writing.

> Those specified landing and service areas shown on Sale Area Map are approved and shall be constructed in accordance with plans and specifications attached hereto.
>
> Landing areas other than those specified on Sale Area Map will be considered for approval under the following conditions:
>
> A. The location and extent of landing area are staked on the ground. The extent or limits shall include the total area of excavation and fill, if any.
>
> B. The clearing needed outside the constructed landing area needed for takeoffs and landings are flagged or otherwise designated.
>
> C. Plans are made to dispose of clearing and landing construction slash and debris.

(Exhibit 30 at 252 (¶ C6.422).)

The Forest Service seeks summary judgment with two alternative theories. The Forest Service concludes that it did not breach the contract and clause because the clause vests in it the absolute discretion to approve or disapprove sites, and the purchaser failed to seek approval for any specific site.

Regarding the absolute discretion argument, the Government is incorrect legally. The clause expressly provides for the consideration of sites other than those designated. Any exercise of discretion is reviewable and must be reasonable; that is, discretion is other than absolute.

The purchaser references the Government-prepared Timber Sale Pre-Operations Meeting documentation:

> Areas to Protect C6.24#, C6.25#, C6.251#, C6.4
>
> Cultural Resources: Only Landings shown on the attached map can be agreed to. This area is of cultural significance to the Kootenai/Salish Tribe [handwritten:] No off road equipment in units 1 and 2[.]

(Exhibit 18 at 114 (¶ 9).)

At this summary judgment stage, based upon the submissions, the Board must assume that the purchaser intended to utilize other than the designated sites, was unaware of any pre-determined restrictions, and did not pursue use of alternative sites because of information conveyed at the pre-operations meeting, and that the Forest Service would not have approved the sites solely for reasons known by the Forest Service prior to award, but undisclosed. The Government has not demonstrated entitlement to summary relief under these circumstances.

Claim Three

In its third claim, the purchaser states:

> The Forest Service violated provision C6.24 by failing to identify in any way that there were cultural resource sites which restrict the operation of the timber sale.

(Complaint at 7 (¶ 27).)

Clause C6.24# provides in pertinent part:

> **Protection of Cultural Resources. (6/99)** Location of known historic or prehistoric sites, building, objects, and properties related to American history, architecture, archaeology and culture . . . shall be identified on the ground by Forest Service.

(Exhibit 30 at 209).

Quoting deposition testimony of a Forest Service archeologist, the Government maintains that there were no known specific sites within the sale areas that required protection under the clause. The testimony indicates that there were areas of cultural resource concerns within the sale areas, albeit not identified by archeologists, instead identified by members of the Salish-Kootenai Tribe. (Government Motion at 5.) The Government-referenced deposition testimony and the documentation from the pre-operations meeting, quoted in reference to claim two above, belie the Government assertion that undisputed facts entitle the Government to summary judgment. The Government has not demonstrated that operations of the sale were not affected by cultural resources coming within the scope of the clause. Therefore, the Government is not entitled to summary judgment for claim three.

_____

JOSEPH A. VERGILIO
Administrative Judge

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